No. 89-575

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY OF THE COMMONWEALTH OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether state discrimination between religious and secular wedding officiants violates the Establishment Clause of the First Amendment of the United States Constitution?

2. Whether a state's conditioning of the performance of public functions upon adherence to religious beliefs violates the Free Exercise Clause of the First Amendment of the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY OF THE COMMONWEALTH OF VIRGINIA

Roy R. Torcaso petitions for a writ of certiorari to review the judgment of the Circuit Court of Prince William County of the Commonwealth of Virginia in this case.

OPINIONS BELOW

The order denying Mr. Torcaso's Petition for Appeal to the Virginia Supreme Court was not reported and is reprinted in the Appendix hereto at App. 1a. The order of the Circuit Court of Prince William County denying the relief requested

by Mr. Torcaso was not reported and is reprinted in the Appendix hereto at App. 2a.

JURISDICTION

The judgment of the Circuit Court of Prince William County was entered on December 16, 1988. The Petition for Appeal to the Supreme Court of the Commonwealth of Virginia was denied on June 8, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Section 20-23 of the Code of Virginia provides:

> When a minister of any religious denomination shall produce before the circuit court of any county or city in this State, or before the judge of such court or before the clerk of such court at any time, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, or proof that he holds a local minister's license and is serving as a regularly appointed pastor in his denomination, such court, or the judge thereof, or the clerk of such court at any time, may make an order authorizing such minister to celebrate the rites of matrimony in this State. Any order made under this section may be rescinded at any time by the court or by the judge thereof.

STATEMENT OF THE CASE

Petitioner Roy R. Torcaso is a member of the American Humanist Association ("AHA"), a non-profit educational and philosophical organization. Since 1972 he has been an accredited "Humanist Counselor" in Maryland, Virginia, and

the District of Columbia. Humanist Counselors—the AHA's counterpart to priests, pastors, and rabbis—solemnize marriages, provide moral counseling, and preside over other rites of passage for AHA members. As an AHA Counselor, petitioner has performed weddings in Pennsylvania, Maryland, and the District of Columbia.

On November 14, 1988, petitioner applied to Prince William County, Virginia, for authority to perform weddings under Section 20-23 of the state's Code, which provides that "minister[s] of any religious denomination" may be authorized to perform marriages.[1] The clerk denied the application, and petitioner sought review by the Circuit Court of Prince William County. He submitted documents showing that he had served as a Humanist Counselor since 1972, that he had remained active within the AHA during the intervening years, and that he had been requested to perform a wedding in Virginia. Without hearing or argument, the court denied petitioner's request on the ground that "said application does not meet any of the requirements of Section 20-23 . . . ." (*See* Appendix 2a.)

Mr. Torcaso filed a Petition for Appeal to the Virginia Supreme Court. He urged that § 20-23 of the Code could be upheld as constitutional only if it were interpreted not to condition his eligibility to perform weddings upon the adher-

[1] This was petitioner's second application for authority to perform weddings under the statute. The first application was made following a request by an AHA member that petitioner officiate at his wedding in Virginia. The Circuit Court of Arlington County denied the application, and the parties were married without petitioner's assistance. Shortly after making his second application, petitioner was again asked to perform a wedding in Virginia.

Section 20-23 of the Virginia Code is the only Virginia statute under which petitioner, a Maryland resident, could apply for such authority. Other sections of the Virginia Code limit the power to perform weddings to (i) Virginia judges or certain qualifying residents who post a bond (§ 20-25) and (ii) religious institutions (§ 20-26).

ence to religious beliefs, and invited such an interpretation of the statute. If, on the contrary, the statute were read to impose religious requirements, petitioner argued it would offend the Establishment Clause and the Free Exercise Clause of the First Amendment, and other provisions of the United States and Virginia constitutions. A panel of the Supreme Court of Virginia heard oral argument on May 26, 1989, on the question whether an appeal should be permitted, and denied the Petition for Appeal without opinion on July 8, 1989 (*See* Appendix 1a.)

REASONS FOR GRANTING THE WRIT

Section 20-23 of the Virginia Code imposes a religious qualification in determining who is eligible to solemnize marriages. Although petitioner serves his own community in the same capacity as ordained ministers serve their parishioners, Virginia denies him the authority to solemnize marriages that it freely grants to his religious counterparts. Such discrimination between religious and non-religious beliefs and affiliations unquestionably offends this Court's decisions applying the Establishment Clause, which prohibits states from enacting laws "respecting an establishment of religion . . . ." *Everson* v. *Board of Education*, 330 U.S. 1, 15-18 (1947); *Wallace* v. *Jaffree*, 472 U.S. 38, 48-55 (1985).

Virtually all states have enacted marriage solemnization laws resembling Virginia's. But other states have saved their laws from constitutional infirmity by applying them so as to make persons like petitioner eligible to perform weddings. The Virginia courts have declined the opportunity to follow that course here. Accordingly, this Court should grant certiorari because the decision below conflicts with this Court's decisions holding that the Establishment Clause and the Free Exercise Clause of the First Amendment forbid discrimination on the basis of religious belief and affiliation.

1. The only plausible basis for Virginia's denying petitioner permission to perform marriages under § 20-23 of the

Virginia Code was his inability to satisfy one of the four requirements imposed by statute: affiliation with "any *religious* denomination."[2] Petitioner submitted uncontested evidence that he was the secular equivalent of a religious minister,[3] and he clearly satisfied all statutory requirements except the "religious denomination" test.[4] Thus petitioner and AHA members were denied the same benefits that are accorded to Baptists, Catholics, and other conventional "religious denominations." Although ministers of religious denominations who reside anywhere in the world may be authorized to perform marriages in Virginia, Humanist Counselors must either be judges or reside in the county where they seek to perform the marriage and post a $500 surety bond.[5]

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[2] Emphasis added. Under Section 20-23 the applicant must (i) be a "minister" (ii) of "any religious denomination" (iii) who submits proof of ordination, and (iv) is in regular communion with a congregation.

[3] The documents submitted *pro se* by Mr. Torcaso included a personal statement about his role and duties as an AHA Counselor and a letter from Arthur M. Jackson, Executive Director of AHA's Division of Humanist Counseling, confirming the date of petitioner's investiture and the functions that he had performed as Counselor. These documents are included in the record below.

[4] Petitioner's duties as a Humanist Counselor easily satisfy the standard for qualifying as a "minister." *See In re Application of Jack Ginsburg*, 236 Va. 165, 372 S.E.2d 387 (1988) ("minister" broadly defined to include anyone with administrative or other duties); *Cramer v. Commonwealth*, 214 Va. 561, 565, 202 S.E.2d 911, 914, *cert. denied*, 419 U.S. 875 (1974) ("minister" is person "selected in accordance with the ritual, bylaws or discipline of the order").

Petitioner also satisfies the "ordination" requirement, which requires merely that he show that he has been appointed to a position within the organization. *Ginsburg*, 372 S.E.2d at 389. Petitioner's uncontradicted proof of active participation as a Humanist Counselor easily fulfills the "regular communion" test, which requires only "mutual participation," "joint or common action," or "a function performed jointly." *Id.*

[5] Section 20-25 of the Virginia Code.

The Establishment Clause prohibits states from discriminating in this way between religious and non-religious beliefs and affiliations. This Court's decisions repeatedly confirm that state discrimination between religion and non-religion violates the Establishment Clause, which "guarantee[s] religious liberty and equality to the 'infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *County of Allegheny* v. *American Civil Liberties Union*, ___ *U.S.* ___, *109 S.Ct. 3086, 3099 (1989) (quoting Wallace* v. *Jaffree*, 472 U.S. 38, 52 (1985)).

This case plainly falls within this Court's decisions holding, in numerous contexts, that the government must be neutral between religion and non-religion:

> —Bible reading or prayer in public schools, *Abington School District* v. *Schempp*, 374 U.S. 203, 218, (1963) (state is to be "neutral in its relations with groups of believers and non-believers"); *Wallace* v. *Jaffree*, 472 U.S. at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all");
>
> —conscientious objection exemptions from military conscription, *Gillette* v. *United States*, 401 U.S. 437, 450 (1971) (First Amendment "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such") and *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (state "cannot draw the line between theistic . . . and secular beliefs");
>
> —state promotion of creationism, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (state "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite");
>
> —religious requirements for notaries public, *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (state cannot "pass laws or impose requirements which aid all religions as against non-believers");
>
> —state aid to public schools, *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985) (First Amend-

ment requires "the government to maintain a course of neutrality among religions, and between religion and nonreligion");

—state aid to families with children in religious schools, *Everson*, 330 U.S. at 16 (state "cannot exclude . . . Non-believers . . . or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation");

—state aid to families with dependent children, *Bowen* v. *Kendrick*, 487 U.S. ____, 108 S.Ct. 2562, 2573 (1988) (Constitution promotes "maintenance of 'a course of neutrality among religions, and between religion and non-religion' ");

—tax exemptions limited to religious publications, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. ____, 109 S.Ct. 890, 896 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally").[6]

Despite the unchallenged evidence that petitioner's position in the AHA is the secular equivalent of a religious minister, Virginia denied petitioner and AHA members rights that would have been accorded to recognized "conventional" religious denominations. To condition rights upon religious requirements unquestionably violates the fundamental principle of religious neutrality that is embodied in the First Amendment.[7]

2. Virginia's marriage solemnization statute corresponds in all material respects to the laws of every other state and

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[6] Although the *Texas Monthly* decision commanded only a plurality of this Court, the fundamental principle of non-discrimination between religion and non-religion was expressly reaffirmed in the concurrence. Justices Blackmun and O'Connor agreed that there is a "previously settled notion that government may not favor religious belief over disbelief." *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. at ____, 109 S.Ct. at 906 (Blackmun, J. concurring).

[7] Section 20-23 therefore violates each of the three prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

the District of Columbia. All states authorize two categories of persons to perform marriages: specified governmental officials[8] (usually judges and justices of the peace) and religious ministers.[9] None provides religiously neutral criteria

[8] Ala. Code 30-1-7 (1988); Alaska Stat. 25.05.261 (1988); Ariz. Rev. Stat. Ann 25-124 (1988); Ark. Stat. Ann. 9-11-213 (1987); Cal. Civil Code 4205 (West 1989); Col. Rev. Stat 14-2-109 (1987); Conn. Gen. Stat. Ann. 46b-22 (West 1989); Del. Code Ann. tit. 13, 106 (1988); D.C. Code Ann. 30-106 (1988); Fla. Stat. Ann. 741.07 (West 1986); Ga. Code Ann. 19-3-30 (Michie 1989); Haw. Rev. Stat. 572-12 (1985); Ill. Rev. Stat. ch. 40, para. 209 (1987) Marriage and Dissolution of Marriage Act; Ind. Code Ann. 31-7-5-1 (Burns 1986); Iowa Code Ann. 595.10 (West 1989); Kan. Stat. Ann. 23-116 (1987); Ky. Rev. Stat. Ann. 402.050 (1984); La. Rev. Stat. Ann. 202 (West 1939); Me. Rev. Stat. Ann. tit. 19, 121 (1988); Md. Family Law Code Ann. 2-406 (1984); Mass. Ann. Laws ch. 207, 38 (Law. Co-op 1989); Mich. Comp. Laws Ann. 551.7 (West 1988); Minn. Stat. Ann. 517.04 (West 1989); Miss. Code Ann. 93-1-17 (1988); Mo. Ann. Stat. 451.100 (Vernon 1986); Mont. Code Ann. 40-1-301 (1988); Neb. Rev. Stat. 42-108 (1988) Nev. Rev. Stat. 122.062 (1985); N.H. Rev. Stat. Ann. 457:31 (1983); N.J. Stat. Ann. 37:1-13 (West 1989); N.M. Stat. Ann. 40-1-2 (1988); N.Y. Dom. Re. Law 11 (McKinney); N.C. Gen. Stat. 51-1 (1988); N.D. Cent. Code 14-03-09 (1989); Ohio Rev. Code Ann. 3101.8 (Anderson 1989); Okla. Stat. Ann. tit. 43, 7 (West 1989); Or. Rev. Stat. 106.120 (1984); Pa. Stat. Ann. tit 48, 1-13 (Purdon 1989); R.I. Gen Laws 15-3-5 (1988); S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); S.D. Codified Laws Ann. 25-1-30 (1989); Tenn. Code Ann. 36-3-301 (1988); Tex. Fam. Code Ann. 1.83 (Vernon 1989); Utah Code Ann. 30-1-6 (1989); Vt. Stat. Ann. tit 18, 5145 (1987); Va. Code Ann. 20-25 (1988); Wash. Rev. Code Ann. 26.04.050 (1989); W.Va. Code 48-1-12 (1986); Wis. Stat. Ann. 765.16 (West 1988); Wyo. Stat,. 20-1-106 (1987).

[9] Ala. Code 30-1-7 (1988); Alaska Stat. 25.05.261 (1988); Ariz. Rev. Stat. Ann 25-124 (1988); Ark. Stat. Ann. 9-11-213 (1987); Cal. Civil Code 4205 (West 1989); Col. Rev. Stat 14-2-109 (1987); Conn. Gen. Stat. Ann. 46b-22 (West 1989); Del. Code Ann. tit. 13, 106 (1988); D.C. Code Ann. 30-106 (1988); Fla. Stat. Ann. 741.07 (West 1986); Ga. Code Ann. 19-3-30 (Michie 1989); Haw. Rev. Stat. 572-12 (1985); Idaho Code 32-303 (1988); Ill. Rev. Stat. ch. 40, para. 209 (1987) Marriage and Dissolution of Marriage Act; Ind. Code Ann. 31-7-5-1 (Burns 1986); Iowa Code Ann. 595.10 (West 1989);

for defining "ministers." Some laws even go so far as to limit authorization to Christians,[10] Protestants,[11] or "Protestants, Catholics, and Jews."[12]

Because literal application of these laws would violate the Establishment Clause, it appears that a number of states are routinely allowing persons who are not "religious ministers" to perform marriages under the marriage solemnization statutes. Indeed, petitioner himself has performed marriages in Pennsylvania, Maryland, and the District of Columbia. Virginia, however, declined the opportunity to interpret and apply its law in a constitutional manner. It therefore stands in conflict with the decisions of this Court—and the practice of many of its sister states—that honor the principle of

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Kan. Stat. Ann. 23-116 (1987); Ky. Rev. Stat. Ann. 402.050 (1984); La. Rev. Stat. Ann. 202 (West 1989); Me. Rev. Stat. Ann. tit. 19, 121 (1988); Md. Family Law Code Ann. 2-406 (1984); Mass. Ann. Laws ch. 207, 38 (Law. Co-op 1989); Mich. Comp. Laws Ann. 551.7 (West 1988); Minn. Stat. Ann 517.04 (West 1989); Miss. Code Ann. 93-1-17 (1988); Mo. Ann. Stat. 451.100 (Vernon 1986); Mont. Code Ann. 40-1-301 (1988); Neb. Rev. Stat. 42-108 (1988) Nev. Rev. Stat. 122.062 (1985); N.H. Rev. Stat. Ann. 457:31 (1983); N.J. Stat. Ann 37:1-13 (West 1989); N.M. Stat. Ann. 40-1-2 (1988); N.Y. Dom. Rel. Law 11 (McKinney); N.C. Gen. Stat. 51-1 (1988); N.D. Cent. Code 14-03-09 (1989); Ohio Rev. Code Ann. 3101.8 (Anderson 1989); Okla. Stat. Ann. tit. 43, 7 (West 1989); Or. Rev. Stat. 106.120 (1984); Pa. Stat. Ann. tit 48, 1-13 (Purdon 1989); R.I. Gen Laws 15-3-5 (1988); S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); S.D. Codified Laws Ann. 25-1-30 (1989); Tenn. Code Ann. 36-3-301 (1988); Tex. Fam. Code Ann. 1.83 (Vernon 1989); Utah Code Ann. 30-1-6 (1989); Vt. Stat. Ann. tit 18, 5145 (1987); Va. Code Ann. 20-23 (1988); Wash. Rev. Code Ann. 26.04.050 (1989); W.Va. Code 48-1-12 (1986); Wis. Stat. Ann. 765.16 (West 1988); Wyo. Stat. 20-1-106 (1987).

[10] Ala. Code 30-1-7 (1988); Ark. Stat. Ann. 9-11-213 (1987); Idaho Code 32-303 (1988).

[11] Mich. Comp. Laws Ann. 551.7 (West 1988); Nev. Rev. Stat. 122.062 (1985); Vt. Stat. Ann. tit 18, 5145 (1987).

[12] S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); Utah Code Ann. 30-1-6 (1989); W.Va. Code 48-1-12 (1986).

religious neutrality in such matters of importance to people's lives.

3. The Free Exercise Clause also prohibits states from establishing religious qualifications for persons who perform state functions. States are prohibited from inquiring into the "truth or verity" of a person's religious beliefs. *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). That principle is the subject of one of this Court's most eloquent affirmations of the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943).

This Court has squarely held that a state which imposes religious requirements upon the performance of state functions, such as those of a notary public, violates the Free Exercise Clause by invading a person's "freedom of belief and religion . . . ." *Torcaso* v. *Watkins*, 367 U.S. at 496. So here states cannot impose religious affiliation and belief requirements upon persons who solemnize marriages.

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari and review the decision below.

Respectfully submitted,

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September 6, 1989

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of June, 1989.

In Re: Application of Roy R. Torcaso to Celebrate Marriages Record No. 890339

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH, *Clerk*

By: */s/*
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT
of
PRINCE WILLIAM COUNTY

IN RE: APPLICATION OF ROY R. TORCASO TO CELEBRATE MARRIAGES

ORDER

The application of Roy R. Torcaso for an order authorizing him to perform marriage ceremonies, pursuant to Section 20-23 of the Code of Virginia, was received and considered by this Court.

Finding that said application does not meet any of the requirements of Section 20-23 of the Code of Virginia, the same is hereby denied.

Entered this 16th day of December, 1988.

/s/ PERCY THORNTON, JR.
PERCY THORNTON, JR., *Judge*

/s/ H. SELWYN SMITH
H. SELWYN SMITH, *Judge*

/s/ HERMAN A. WHISENANT, JR.
HERMAN A. WHISENANT, JR., *Judge*

/s/ FRANK A. HOSS, JR.,
FRANK A. HOSS, JR., *Judge*